

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

DANIEL H.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

CASE NO. C19-6147-BAT

**ORDER REVERSING THE  
COMMISSIONER AND REMANDING  
FOR FURTHER PROCEEDINGS**

Plaintiff appeals the ALJ's decision finding him not disabled. He contends the ALJ erroneously: (1) found he could frequently reach with his right upper extremity, and stand and walk at the light work level; (2) evaluated several medical opinions; and (3) rejected the lay testimony. Dkt. 21 at 1. For the reasons below, the Court **REVERSES** the Commissioner's final decision and **REMANDS** the matter for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

**DISCUSSION**

**A. Light Work - Reaching Limitations**

The ALJ found plaintiff has the residual functional capacity (RFC) to perform less than the full range of light work and can do "work that does not require him to reach forward or

1 laterally with the right arm more than frequently." Tr. 19. The ALJ arrived at this finding by  
2 rejecting the opinions of several doctors. Tr. 21. Plaintiff contends the ALJ erred.

3       Reviewing doctors J.D. Fitterer, M.D, and Greg Saue, M.D. opined plaintiff "could  
4 occasionally use his right upper extremity to reach in front, laterally, or overhead." Tr. 21. The  
5 doctors based their opinion on Dr. Helibrunn's consultative examination report. Tr. 264. The ALJ  
6 rejected the reviewing doctors' opinions on the grounds there "is a lack of records to support the  
7 limitations he displayed at the consultative examination." *Id.*

8       Drs. Fitterer, Saue, and Helibrunn agree plaintiff is limited to occasional reaching with  
9 the right arm. There are no medical opinions to the contrary. ALJ was thus required to provide  
10 clear and convincing reasons to reject their opinions. *Lester v. Chater*, 81 F.3d 821, 830-31 (9th  
11 Cir. 1996). An ALJ does this by setting out a detailed and thorough summary of the facts and  
12 conflicting evidence, stating his or her interpretation of the facts and evidence, and making  
13 findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). The ALJ must do more than  
14 offer his conclusions; he must also explain why his interpretation, rather than the treating  
15 doctor's interpretation, is correct. *Orn v. Astrue*, 495 F.3d 625, 632 (9th Cir. 2007).

16       Here, the ALJ erred by providing nothing more than the conclusory statement "there is a  
17 lack of records." Simply stating a conclusion does not constitute the type of substantial evidence  
18 necessary to overcome a doctor's opinion. *See Popa v. Berryhill*, 872 F.3d 901, 906 (9th Cir.  
19 2017). The Commissioner defends the ALJ arguing the ALJ properly weighed conflicting  
20 medical opinions and the RFC includes all of plaintiff's limitations. The ALJ did not reject the  
21 medical opinions on this basis and the argument is thus an impermissible post-hoc argument  
22 upon which the Court can rely. *See Bray v. Comm'r of SSA*, 554 F.3d 1219, 1225 (9th Cir. 1995)

1 (bCourt reviews the ALJ's decision "based on the reasoning and findings offered by the ALJ—  
2 not post hoc rationalizations that attempt to intuit what the adjudicator may have been  
3 thinking.").

4 The ALJ accordingly erred. The error is harmful because the Vocational Expert (VE)  
5 testified that of plaintiff was limited to occasional use of the right arm he would be able to  
6 perform work at the light or sedentary level. Tr. 35.

7 **B. Light Work – Lifting, Carrying, Standing and Walking Limitations**

8 Dr. Heilbrunn opined plaintiff can carry/lift 0-10 pounds, and can stand or walk  
9 cumulatively for 3 hours in an 8 hour day. Tr. 269. Dr. Fitterer agreed with Dr. Heilbrunn  
10 regarding plaintiff's standing/walking limitations but not his carry/lift limitations; Dr. Fitterer  
11 concluded plaintiff is limited to sedentary work. Tr. 58-60. Dr. Saue opined plaintiff could  
12 stand/walk for six hours, carry up to 20 pounds and carry 10 pounds frequently. Tr. 73.

13 The ALJ found plaintiff has the RFC to perform jobs calling for less than the full range of  
14 light work, with occasional right arm overhead reaching. Tr. 19. The RFC determination does not  
15 mention reaching limitations in other directions or how long plaintiff can walk/stand in a  
16 workday. The ALJ's assessment of these limitations is revealed in the hypothetical question to  
17 the VE. The ALJ asked the VE to assume plaintiff can "sit, stand and walk six hours . . . and  
18 "occasionally reach overhead with the right upper extremity and can frequently reach in front  
19 laterally with the right upper extremity." Tr. 34.

20 Plaintiff argues the ALJ's RFC determination is erroneous. The argument hinges on  
21 whether the ALJ properly rejected Dr. Helibrunn's opinion plaintiff is more limited than the ALJ  
22 assessed. If the ALJ harmfully erred, the case must be remanded to reassess Dr. Heilbrunn's  
23

1 opinions and the opinions of Drs. Fitterer and Saue who relied upon Dr. Heilbrunn's opinions.  
2 Conversely if the ALJ did not err, than the ALJ correctly discounted all three medical opinions.

3       The ALJ rejected Dr. Heilbrunn's opinion first noting the "claimant knew this  
4 examination was being conducted for the purpose of assessing his eligibility for disability  
5 benefits and had no incentive to give his best effort." Tr. 21. Substantial evidence does not  
6 support the ALJ's rationale. The Department of Disability Determination Services ordered  
7 plaintiff be examined by Dr. Heilbrunn. Tr. 263. There is no evidence plaintiff arranged for the  
8 examination in order to procure inaccurate medical evidence. Also Dr. Heilbrunn examined  
9 plaintiff and did not indicate plaintiff displayed a lack of cooperation or "poor effort" during the  
10 examination. *Cf. Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001) (Poor effort may  
11 may support an adverse credibility determination).

12       The ALJ also discounted Dr. Heilbrunn's opinion because it was a "one-time examination  
13 of the claimant, which resulted in remarkable findings within the claimant's subjective control."  
14 The ALJ's rationale contains two lines of thought. First, a single examination is grounds to reject  
15 Dr. Heilbrunn's opinion. A consultative examining doctor such as Dr. Heilbrunn, normally  
16 renders medical opinions based upon one examination of the claimant. Thus rejecting the opinion  
17 of a consultative examining doctor would mean rejecting virtually all consultative examination  
18 opinions. The ALJ's rationale is illogical because it defeats the purpose of ordering a consultative  
19 examination. Additionally, the rationale flies in the face of the requirement the ALJ is required,  
20 in determining a claimant's RFC, to assess all the relevant evidence, including medical opinions  
21 and reports. *See* 20 C.F.R. § 416.945(a).

22       Second, the ALJ rejected Dr. Heilbrunn's opinion reasoning the doctor's findings were  
23 based on things within "the claimant's subject control." This rationale is not supported by

1 substantial evidence. The rationale implies plaintiff was malingering and Dr. Heilbrunn's  
2 opinions are thus invalid. But Dr. Heilbrunn did not find plaintiff was malingering; the ALJ's  
3 decision also make no findings that plaintiff is a malinger. Accordingly the Court concludes the  
4 ALJ harmfully erred in rejecting Dr. Heilbrunn;s opinions. The error is harmful because it  
5 resulted in a RFC determination that fails to account for the limitations assessed by Dr.  
6 Heilbrunn.

7 The commissioner defends the ALJ arguing the ALJ properly discounted Dr. Heilbrunn's  
8 opinions becasye they were not supported by the treatment record and are bolstered by the  
9 opinions of Drs. Fitterer and Saue. But, the ALJ did not reject Dr. Heilbrunn's opinions on this  
10 basis and the argument is thus an impermissible post-hoc argument.

11 **B. Lay Testimony**

12 The ALJ acknowledged Shawna M's testimony that after plaintiff was shot, he had  
13 difficulty with loud noises, cannot stand for long periods of time and it is hard for him to lift  
14 things with his right shoulder and arm. Tr. 22. The ALJ rejected Ms. M's testimony because "the  
15 record contains no treatment evidence to support the degree of limitation Ms. M. alleges." *Id.*  
16 The ALJ erred. The ALJ cannot reject a lay witness's testimony simply because it is not  
17 corroborated by objective medical evidence. *Bruce v. Astrue*, 557 F.3d 1113, 1116 (9th Cir.  
18 2009) (Court rejected as improper ALJ's reasoning the lay testimony was "not supported by the  
19 objective medical evidence."); *see also Kelly v. Berryhill*, 732 Fed. Appx. 558, 564 (9th Cir.  
20 2018) (ALJ's rejection of wife's testimony as "not supported by the objective evidence," was  
21 "legally erroneous under our precedent.").

22 The Commissioner argues even if the ALJ erred, the error was harmless because Ms. M's  
23 testimony is similar to plaintiff's testimony which the ALJ rejected. But this argument is not

1 based upon a finding the ALJ made because the ALJ rejected Ms. M's testimony without  
2 indicating whether it was or was not similar to plaintiff's. The Court declines to weigh the  
3 evidence when the ALJ has not. That is a matter reserved to the ALJ, and not a determination the  
4 Court should make for the first time on appeal. In sum, the ALJ erroneously rejected Ms. M's  
5 testimony and should reassess it on remand.

6 **CONCLUSION**

7 The Court **REVERSES** the Commissioner's final decision and **REMANDS** the case for  
8 further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

9 On remand, the ALJ shall reevaluate the lay testimony of Ms. M. and the opinions of Drs.  
10 Fitterer, Saue, and Heilbrunn; take plaintiff's testimony if he appears at the hearing, develop the  
11 record further and redetermine the RFC as needed, and proceed to the remaining steps as  
12 appropriate.

13 DATED this 2nd day of December, 2020.

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BRIAN A. TSUCHIDA  
United States Magistrate Judge